In The

Supreme Court of the United States

October Term, 1976

No. 76-1622

IN RE REINER INDUSTRIES, INC., DEBTOR

MARCUS ROTTENBERG,

Petitioner,

vs.

IRVING SULMEYER, TRUSTEE,

Respondent.

MARCUS ROTTENBERG,

Petitioner,

vs.

INTERNATIONAL FASTENER RESEARCH CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

~~A. WALTER SOCOLOW~~
~~EDWARD M. BERMAN~~

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vs.

INTERNATIONAL FASTENER RESEARCH CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Marcus Rottenberg, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 24, 1977.

OPINIONS BELOW

The unpublished opinion of the Bankruptcy Judge of the United States District Court for the Central District of California upon which the orders appealed from were predicated is printed in Appendix A. The unpublished opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 24, 1977 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner, a lien creditor of the Chapter XI Receiver with certain priorities and property rights created and vested in him by a bankruptcy court order entered on May 24, 1973, deprived of his rights and property without constitutional due process of law by said bankruptcy court's *ex parte* order of July 30, 1974 which created new liens and superior rights on the bankrupt's assets without notice to petitioner?

2. Was petitioner time-barred from appealing directly from the July 30, 1974 *ex parte* order which permitted the Trustee to rescind the fully executed court-confirmed private sale of limited assets of the bankrupt and directed a new public sale of all of the bankrupt's assets (including those not sold under the rescinded agreement) without notice and without waiving notice to the

bankrupt's creditors, particularly where, on July 29-30, 1974 the Trustee made affirmative representations to petitioner's counsel while at the same time he engaged in contrary secretive acts resulting in the *ex parte* order that destroyed petitioner's May 24, 1973 court-approved property rights in the bankrupt's assets?

3. Was the December 18, 1974 order appealable as constituting a determination on the merits of petitioner's application for reconsideration of the July 30, 1974 *ex parte* order, irrespective of the form in which the order was cast?

STATUTORY PROVISIONS INVOLVED

The case involves the following constitutional provisions, statutes and rules:

United States Constitution Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis supplied.)

30 Stat. 555, 11 U.S.C. §67(a)(1):

> "§67. Duties of referees; prohibition against practice of law and acting as trustees or receivers; review of orders

(a) Referees shall (1) give notice to creditors and other parties in interest, as provided in this title; . . ."

74 Stat. 528, 11 U.S.C. §67(c):

"§67. Duties of referees; prohibition against practice of law and acting as trustees or receivers; review of orders

• • •

(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

52 Stat. 867, 11 U.S.C. §94(a)(4):

"§94. Notices

(a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they

appear in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of . . .

(4) all proposed sales of property: *Provided*, that the court may, upon cause shown, shorten such time or order an immediate sale without notice; . . ."

52 Stat. 909, 11 U.S.C. §744:

"§744. Issuance of certificates of indebtedness

During the pendency of a proceeding for an arrangement, or after the confirmation of the arrangement where the court has retained jurisdiction, the court may upon cause shown authorize the receiver or trustee, or the debtor in possession, to issue certificates of indebtedness for cash, property, or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable."

Bankruptcy Rule 802(a):

"(a) Ten-Day Period. The notice of appeal shall be filed with the referee within 10 days of the date of the entry of the judgment or order appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires."

STATEMENT OF THE CASE

The following facts are material to the consideration of the questions presented:

1. Petitioner made loans to the Bankruptcy Act Chapter XI Receiver of the debtor in accordance with statute and the bankruptcy court order entered on May 24, 1973.

2. The Receiver issued to petitioner Certificates of Indebtedness evidencing said loans, in form approved by the bankruptcy court, which granted priorities and created certain lien rights in petitioner's favor against the Chapter XI debtor's assets in that proceeding and in any subsequent bankruptcy proceeding.

3. On February 2, 1974, after petitioner's Certificates of Indebtedness had matured and remained unpaid, the Chapter XI proceeding terminated, the debtor was adjudicated a bankrupt and the Chapter XI Receiver was succeeded by a Trustee in Bankruptcy ["Trustee"] (the same individual served in both fiduciary capacities). The Trustee continued operating the business of the bankrupt.

4. On July 12, 1974 the Trustee sold and conveyed certain, limited, assets of the bankrupt at private sale without notice to creditors, as authorized by court order, and received the full stipulated consideration therefor from the contract vendee, respondent International Fastener Research Corporation ("IFR"). IFR immediately took over the sold assets, and began operating the bankrupt's business for IFR's own account and benefit. No provision of the underlying sales agreement remained to be performed. The sales agreement did not contain a rescission provision.

5. On July 24, 1974, the Trustee filed adversary proceedings against petitioner to determine priorities in said sales proceeds

and in the bankrupt's remaining assets; the court thereupon issued a summons requiring petitioner to answer by August 19, 1974 and set the hearing therein for August 30, 1974.

6. Petitioner was satisfied with the sale to IFR, and relied upon the plain priorities accorded to him by his Certificates of Indebtedness for his senior rights in the contract consideration paid by IFR and in the remaining assets of the bankrupt. Only his priorities in those assets remained to be fixed in the adversary proceeding.

7. On July 29, 1974, the Trustee wrote to petitioner's counsel concerning said adversary proceeding and promised to keep counsel abreast of all developments in the bankruptcy proceedings. As a Chapter XI creditor of the Receiver, petitioner had no need to resort to or continually search the court file in the bankruptcy proceedings. His only interest was his 1973-established property and lien rights in the bankrupt's assets and his priority right of reimbursement therefrom, which was to be determined in the adversary proceeding.

8. The Trustee failed to tell petitioner's counsel, however, that he, the Trustee, had prepared an application on the very same day (July 29, 1974), on behalf of himself and IFR to have the court approve rescission of the sale, to have *all* of Reiner's assets (not merely those sold under the Agreement) sold to repay the sales consideration to IFR, and to have subrogation and lien rights imposed in favor of IFR upon *all* of Reiner's assets (even those not sold to IFR) senior to petitioner's priority lien — in effect, to eliminate substantially all of the assets available to the Receiver's creditors which were the subject matter of the adversary proceeding.

9. On July 30, 1974, the Bankruptcy Judge made an *ex parte* order upon said application which vacated the private sale, created new property rights in favor of IFR against all of the bankrupt's assets (including those which had not been sold to

IFR), directed the public sale of the bankrupt's assets without notice and without waiving notice to the bankrupt's creditors, created superior lien and subrogation rights in all said assets in favor of IFR, and subordinated petitioner's Chapter XI-created vested property and lien rights to IFR and to all other creditors of the Trustee.

10. When petitioner's counsel went to court in connection with the adversary proceeding, which was rendered almost entirely moot by the July 30, 1974 *ex parte* order, he discovered the July 30, 1974 *ex parte* order; petitioner promptly sought reconsideration thereof.

11. On September 9, 1974, the bankruptcy court made an order that it would reconsider its July 30, 1974 *ex parte* order and conduct hearings with respect thereto. Testimony and proof were adduced at two hearings; extensive memoranda of law were filed by opposing counsel arguing the merits of said order.

12. On November 14, 1974, the bankruptcy court rendered a 7-page opinion (Appendix A hereto) which analyzed and reaffirmed its July 30, 1974 *ex parte* order on the merits, and determined petitioner's Chapter XI Certificates of Indebtedness priority and lien rights in whatever assets of the bankrupt might remain after the new rights created under the July 30, 1974 *ex parte* order were satisfied.*

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* The underlying sales agreement between the Trustee and the vendee, respondent IFR, did not contain any subrogation provision. The agreement expressly merged all oral understandings and negotiations into itself, stated that it constituted the parties' entire understanding, and prohibited oral modifications. IFR contended there was an oral, contingent, retroactively effective subrogation agreement with the Trustee. The Bankruptcy Judge rejected that contention *sub silencio*, but upheld the subrogation rights created by the *ex parte* order in favor of IFR solely upon California equity law (Appendix A, page 4a, *supra*). In reviewing the facts, the United States Court of Appeals for the Ninth Circuit erroneously stated that subrogation had been agreed upon (Appendix B, page 12a, *supra*).

13. On December 18, 1974, the bankruptcy court made an order determining petitioner's reconsideration motion, pursuant to said opinion. Notwithstanding the September 9, 1974 order and the November 14, 1974 on-the-merits opinion (Appendix A), the order was cast in the form of a "denial of application to reconsider" the July 30, 1974 *ex parte* order. Petitioner appealed therefrom claiming that the September 9, 1974 order granted reconsideration, that evidence was adduced and extensive argument had in respect of the issues, that the opinion actually reaffirmed the *ex parte* order on the merits, and that the order entered as directed in the opinion was substantive and appealable, irrespective of the form it took, and subjected the underlying *ex parte* order to review.

14. On January 2, 1975, the bankruptcy court made an order determining that petitioner's Chapter XI Certificates of Indebtedness vested property rights in whatever assets of the bankrupt might remain after the new rights created by the July 30, 1974 *ex parte* order were satisfied would be subordinate to all of the Trustee's creditors. Petitioner appealed therefrom.

REASONS FOR GRANTING THE WRIT

The court of appeals rendered a decision which conflicts with applicable decisions of this court. Special and important reasons require review by the Supreme Court of the United States.

A. Constitutional principles rendered the July 30, 1974 *ex parte* order nugatory and precluded application of the ten-day review time bar of 11 U.S.C. §67(c) and Bankruptcy Rule 802(a) to petitioner's property and priority rights as a creditor of the Receiver.

Petitioner had vested property rights in the bankrupt's assets, which at July 30, 1974 were comprised of the contract

consideration paid by IFR for specified assets of the bankrupt, and the remaining assets of the bankrupt not sold to IFR.

The real effect of the Trustee's July 29-30, 1974 *ex parte* application was to seek judicial elimination of the contract consideration fund, and of the bankrupt's remaining assets, which were the subject of the adversary proceeding commenced by the Trustee on July 24, 1974, which was to be heard on August 30, 1974.

The proposed disposition of the contract consideration fund was no different from the proposed sale of any other property, as to which notice to petitioner and to all other creditors was required by 11 U.S.C. §94(a)(4). The proposed sale at public auction of assets of the bankrupt to generate funds sufficient to repay the contract consideration to IFR — including the sale of assets not sold to IFR — was one requiring notice to petitioner and all other creditors [11 U.S.C. §94(a)(4)].

The bankruptcy court's July 2, 1974 order authorized the private sale of specified, limited, assets of the bankrupt without notice to creditors. However, the sale contemplated by the July 29-30, 1974 *ex parte* application was a public sale of substantially all of the bankrupt's assets, including those not included within the compass of the July 2, 1974 order. The ensuing July 30, 1974 *ex parte* order did not shorten the ten-day notice requirement of 11 U.S.C. §94(a)(4) or waive such notice for good cause shown; the July 2, 1974 order was ineffective for that purpose.

Moreover, the petitioner, as a court-created prior lienholder, was entitled, upon the plainest principles of justice and equity, to contest the necessity, validity and effect of (a) the ground asserted for setting aside the sale and thereby ousting him of his vested rights (i) in the proceeds thereof, and (ii) in the assets of the bankrupt not sold to IFR, (b) the oral subrogation agreement alleged by the Trustee, and (c) the creation of super

priority lien rights in favor of IFR on *all* of Reiner's assets. Petitioner's valid subsisting lien could not be affected without notice to him or his consent. *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U.S. 434, 439 (1886); *Coursey v. International Harvester Co.*, 109 F.2d 774 (10th Cir. 1940); *Nicholson v. Western Loan & Building Co.*, 60 F.2d 516 (9th Cir. 1932); *Northwest Marine Works v. United States*, 307 F.2d 537 (9th Cir. 1962); *In re Mannington Pottery Co.*, 104 F. Supp. 506 (N.D. W. Va. 1952).

The Supreme Court has reaffirmed constitutional due process in an increasing variety of cases. The basic doctrine has been applied not only to *ex parte* judicial action but also to proceeding under administrative law as well as to unilateral exercise of legal rights by private citizens. Bankruptcy rules may not be construed, as did the courts below, to sanction violation of petitioner's essential constitutional rights to notice of any procedural impact on his property rights. Moreover, petitioner's judically-created special status as a lienor under the Receiver's Certificates of Indebtedness should not have been adversely affected below by the imposition of time bars which relate to routine steps in bankruptcy proceedings applicable to general creditors of a bankrupt whose debts arose prior to such proceedings.

Constitutional procedural due process inexorably required notice to petitioner and an opportunity for him to be heard before his property rights could be modified, abrogated or destroyed *ex parte*. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Laing v. United States*, 423 U.S. 161 (1976); *Hanley v. Four Corners Vacation Properties, Inc.*, 480 F.2d 536 (10th Cir. 1973); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); and *Straley v. Gassaway Motor Company, Inc.*, 359 F. Supp. 902 (S.D. W.Va. 1973). The July 30, 1974 order was constitutionally and otherwise defective and void.

B. Equitable principles, as well as constitutional due process concepts of fair play, estopped the Trustee and IFR from asserting that the ten day time bar of U.S.C. §67(c) and Bankruptcy Rule 802(a) was applicable to petitioner who was a lien creditor of the Receiver.

It is respectfully contended that the duplicity of the Trustee, acting for IFR — making affirmative statements and assurances to petitioner's counsel by July 29, 1974 letter designed to keep the latter off-guard, away from the court file, and concerned only with the August 30, 1974 adversary proceeding hearing, while the Trustee was on the same day furtively proceeding *ex parte* to eliminate and put beyond petitioner's reach the very assets which were the subject of that adversary proceeding — created an equitable estoppel barring the Trustee and IFR from asserting the applicable ten-day time bar which was born out of those tainted acts.

C. The December 18, 1974 order was predicated upon the Bankruptcy Judge's lengthy on-the-merits opinion, following hearings and extensive legal arguments by adversary counsel after the bankruptcy court's September 9, 1974 order which expressly granted reconsideration of the July 30, 1974 *ex parte* order, and was appealable irrespective of its form. *Smith v. Hill*, 317 F.2d 539 (9th Cir. 1963); *In re Brendan Reilly Associates, Inc.*, 372 F.2d 235 (2d Cir. 1967); *In re Casco Fashions, Inc.*, 346 F. Supp. 1252 (S.D.N.Y. 1972).

D. It was error, in any event, for the July 30, 1974 *ex parte* order to direct that assets of the bankrupt, other than those which had been sold to IFR, be sold for purposes of reimbursing IFR from the proceeds of such sale for the contract consideration it had paid. *Dayton v. Hanard*, 241 U.S. 588 (1918).

In summary:

No one but petitioner would lend funds to the Chapter XI debtor, and he did so only because of the protections and property rights accorded to him by the court-approved Certificates of Indebtedness issued by the Receiver. He was entitled to notice of the application made *ex parte* by the Trustee, on behalf of IFR, resulting in the July 30, 1974 order which had the effect of disposing of substantially all of the bankrupt's assets in which petitioner had vested property rights. The ten day time bar cannot be availed of by the Trustee or IFR who perverted it to their use by duplicity. In any event said time bar should not have been applied to petitioner who was a lien creditor of the Receiver rather than a pre-insolvency creditor of the bankrupt. The December 18, 1974 order was, in substance, one on the merits after reconsideration was granted, and was appealable, subjecting the July 30, 1974 *ex parte* order to review.

CONCLUSION

For the foregoing reasons, petitioner, Marcus Rottenberg, respectfully prays that this petition for certiorari be granted.

Respectfully submitted,

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EDWARD M. BERMAN

ALLAN J. GREENBERG and
A. WALTER SOCOLOW
Attorneys for Petitioner,
Marcus Rottenberg

APPENDIX A — LETTER DECISION OF BANKRUPTCY JUDGE

November 14, 1974.

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In re: Reiner Industries, Inc.
In Bankruptcy #73-05066

Gentlemen:

There are two matters in connection with the above-entitled case now under submission. The first one is whether or not this court should reconsider its order of July 30, 1974 declaring rescission of an order of private sale of the assets of the above-named bankrupt, which private sale had been authorized by the court on July 2, 1974 after unsatisfactory bids had been submitted at a sale in open court following due notice to creditors as required by law.

A private sale was made by the trustee on July 12, 1974 which was amazing to the court, since Mr. Reiner, former president of the bankrupt, claimed to own the patents used by

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the bankrupt and litigation on that point had not been concluded at that time. This private sale was confirmed by the court to International Fastener Research Corp. (hereinafter referred to as IFR) according to the terms of an agreement which contained a proviso that the sale be approved by Court Order no later than July 12, 1974 and such order "becomes final for all purposes no later than July 23, 1974". On July 12, IFR gave the trustee one million dollars and the trustee used said monies to pay off certain secured creditors and IFR took possession of the debtor's assets and premises. On the ninth day after the Order approving the sale was entered, Kenneth Reiner, former president of the bankrupt and a creditor, filed a notice of appeal as authorized by Bankruptcy Rule 802(a). Immediately thereafter IFR gave notice of rescission because the above-mentioned proviso in the sales agreement had not been fulfilled.

The trustee was quite right in recognizing IFR's right to rescind. IFR is well represented by counsel and certainly when it parted with one million dollars, it had a right to lay down the conditions it did. As a result of this rescission, and still under order of court to sell at private sale, the trustee asked the court for an order rescinding the sale approved on July 12 and providing for a compromise with IFR. Said order of rescission is dated July 30, 1974 and it is this order that the applicant, Marcus Rottenberg, receiver's certificate holder to the extent of $350,000.00, seeks to have reconsidered by the court because it was done ex parte, among other things, but principally because it subrogates IFR to the secured creditors paid off out of the one million dollars it paid on July 12.

The applicant, Rottenberg, is an aged uncle of Kenneth Reiner, former president and principal of the debtor, and who bought two receiver's certificates totaling $350,000.00 at the urging of his nephew and contrary to the advice of his attorney, Allan Greenberg, which certificates were authorized by the

Appendix A

Court, the contents of which speak for themselves. The second question posed to the court involves their interpretation and status.

All through the proceedings since Rottenberg bought the receiver's certificates, his counsel, Allan Greenberg, a very able attorney, has been in contact with the receiver, who became trustee after adjudication. At all times Mr. Greenberg was aware of the trustee's difficulties in operating the debtor-bankrupt's business so it could be sold as a going concern, despite the obstacles placed in his way by Mr. Reiner, who claimed to own patent rights on the hair clips manufactured by the debtor, forcing the trustee to engage in prolonged litigation before the undersigned Bankruptcy Judge, and then appealing to the District Judge after an adverse ruling. Incidentally, the ruling that the patents belonged to the debtor was affirmed by the District Judge. Also, the appeal of Mr. Reiner from the sale of July 12 was dismissed by the District Judge. The trustee has testified that had it not been for Mr. Reiner's obstruction, this business, which was quite viable, could have been sold for two million dollars which would have paid off practically everybody connected with the case.

It is true that Mr. Rottenberg, through Mr. Greenberg, never told the trustee to continue to operate the bankrupt's business when it appeared to be a losing proposition, but he never asked the trustee to close it down either — and rightfully so. The court was aware of the danger of continued operation but was advised of the opportunity to sell the business as a going concern by the trustee who was negotiating with IFR for some time before July 12. Mr. Greenberg realized, I am sure, that the only hope of Mr. Rottenberg's recovery of his $350,000.00, to say nothing of interest, was to sell this viable salable business, as a going operation. To shut it down was to abandon all hope of a fair recovery. These facts were known to all concerned all along the tortuous path of the administration of this case.

Rottenberg complains that he had a senior lien by reason of his receiver's certificates under the order of July 12. Despite the pleas of the trustee to get Mr. Greenberg and, in turn, Mr. Rottenberg to persuade Mr. Reiner to dismiss his appeal from the Order of July 12, Mr. Reiner refused and the Order of July 30 became necessary. As to formal notice, I don't think Mr. Rottenberg was entitled to notice of the order of July 30 any more than he was to the order of July 12 entered pursuant to an order of private sale.

Mr. Rottenberg claims he lost the senior lien he had on the assets of the bankrupt under the order of July 12 by the order of July 30, which he wants reconsidered since the time for appeal has long since expired. It is his contention that he lost his senior lien because the Order of July 30 subrogates IFR to the secured creditors who were paid off by the trustee with IFR's million dollars. I can't imagine a result more unjust and I don't believe the law compels such an outcome.

"Subrogation does not necessarily depend on contractual relations. It is considered the creature of equity, and is so administered as to secure justice without regard to form. Accordingly, the right of subrogation can be invoked only when justice demands its application and the one asking subrogation has a greater equity than those who oppose him. The application of the doctrine must depend on the circumstances of each case.***" 46 Cal. Jur. 2d, p. 67. In this case, in the judgment of this court, IFR has a greater equity than Rottenberg.

The provisions for auction are a part of the authorized private sale which had to be compromised — thus no notice to creditors is required by law.

Consequently, the Application to Reconsider the Order of July 30, 1974 should be denied. Counsel for IFR will prepare,

serve and submit the documentation to formalize this announcement of ruling.

The court will add that it is difficult to see wherein Mr. Rottenberg is in any worse position after the Order of July 30 than he was before.

The second question before the court is the trustee's complaint to determine priority of operating expenses over the Receiver's Certificates of Indebtedness, filed July 24, 1974. In determining this question the receiver's certificates must be viewed in their entirety in the "cool light of reason" giving due consideration to their purpose and the circumstances as they existed at the time they were issued.

This case was filed under Chapter XI on May 9, 1973. The business was closed. It had an indebtedness, according to the schedules filed July 9, 1973, totaling $3,292,426.54 of which $1,673,987.62 was secured. Unpaid wages totaled $69,202.36; unpaid taxes amounted to $186,458.95. It had claimed assets of $3,579,077.23, among which was $1,030,873.89 in accounts receivable pledged to A.J. Armstrong Co. The schedules speak for themselves and reflect the rather sorry condition of this business. However, the debtor manufactured and sold patented hair clip and rollers nationwide under the trade name "Lady Ellen" and in Canada as well. The items were in demand, and were sold in chain stores throughout the country. The market for the product was good; it was mass produced and sold at low cost to women who found the hair clips particularly useful and a big improvement over the old style hair pin.

The $350,000.00 was needed by the receiver to open the business and Mr. Reiner prevailed upon his aged uncle, Marcus Rottenberg, of New York to buy the two receiver's certificates in question against the advice of Mr. Greenberg, his local attorney. The two certificates were authorized by the court and the

certificates were issued on May 24, 1973, one for $100,000.00 and one for $250,000.00. The money was used by the receiver who later became trustee after adjudication.

For some undefinable reason, many people seem to feel that there is something sanctified about a receiver's certificate just as some people believe that when the Bankruptcy Court retains jurisdiction after a plan under Chapter XI is approved, the plan is bound to work out.

A receiver's certificate gives nothing except what is provided in its terms and its eventual value is dependent upon the success of the receiver's operations.

The certificates speak for themselves, however, it should be noted that the lien of Mr. Rottenberg was expressly made subject to pre-existing liens and security interests and particularly in security interests and encumbrances in present and future accounts and inventory of the Debtor and Receiver in favor of A.J. Armstrong Co., Inc. Mr. Rottenberg's lien was made senior to all expenses of administration in the Chapter XI proceeding *and in any superceding bankruptcy proceeding* except for the Referee's Salary and Expense Fund. In spite of this seniority the certificate provided that the lien was subject to depletion for current operating purposes and the Receiver may pay ahead of the lien any costs or expenses incurred by him in connection with his operation of the debtor's business.

To this court, this means that Mr. Rottenberg's lien is behind the Referee's Salary and Expense Fund and expenses of the Receiver who later became trustee in operating the business of the debtor. As it is, and unless the trustee can recover additional assets in huge amounts, and there are some other assets, the receiver-trustee and his attorney who has worked hard and manfully in this case will receive nothing because of

Mr. Rottenberg's lien. At no time during the course of the administration of this estate has Mr. Rottenberg demanded of the receiver-trustee to return or asked this court to order the return of the money he advanced on these certificates, even though all along Mr. Greenberg knew that the trustee was operating this business. No objection whatever was raised to the operations of the trustee by Mr. Greenberg, and wisely so, because it was plain to see the only hope of a complete recovery by Mr. Rottenberg was the sale of this business as an operating business.

For this court on this record to conclude that Mr. Rottenberg was entitled to be paid ahead of the operating expenses of the trustee would expose the receiver-trustee to a liability for actions he took with, at least, the tacit approval of Mr. Greenberg, to save Mr. Rottenberg's rather foolish investment than to destroy it. The words "superceding bankruptcy proceeding" is mentioned in the certificates. That means to me that the trustee's expenses of operation are ahead of Mr. Rottenberg's lien. To reach any other result in this situation would be as unjust as a reconsideration of the order of July 30, 1974, in my considered judgment.

The trustee relied upon the order of July 12 in paying off the secured creditors. Mr. Rottenberg had no vested right created by the order of July 12. Any right he had by reason of that order was contingent upon the order becoming final. It never did become final for a good reason. Unless there is a case *directly* to the contrary on the issues presented here, it is clear to me that law and equity demand the results heretofore stated. I know of no such case as I read the cases.

Therefore, counsel for the trustee shall prepare, serve and submit the necessary documentation to formalize this

Appendix A

announcement of ruling on the question of priority of operating expenses over Mr. Rottenberg's lien.

Yours very truly,

HOWARD V. CALVERLEY
Bankruptcy Judge

HVC:jp

cc: Mr. Irving Sulmeyer
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APPENDIX B - OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re Reiner Industries, Inc.

Debtor.

MARCUS ROTTENBERG,

Applicant-Appellant,

vs. No. 75-2482

IRVING SULMEYER, TRUSTEE,

Respondent-Trustee.

MARCUS ROTTENBERG,

Applicant-Appellant,

No. 75-2483

vs.

MEMORANDUM

INTERNATIONAL FASTENER RESEARCH CORPORATION,

Respondent-Appellee.

[February , 1977]

Appendix B

Appeal from the United States District Court for the Central District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and KING,* District Judge.

FACTS

These two cases involve the appellant Marcus Rottenberg's claim that his rights under two certificates of indebtedness were prejudiced by orders entered by the bankruptcy judge after the debtor for whose benefit the certificates were issued was adjudicated a bankrupt.

In May, 1973, Reiner Industries entered Chapter XI proceedings and Irving Sulmeyer was appointed Receiver. Since all concerned felt that the on-going value of the corporation exceeded its liquidation value, the Receiver looked around for an infusion of cash which would keep the corporation going until it could get back on its feet. Kenneth Reiner, the founder of Reiner Industries persuaded the appellant, his uncle, to loan the Receiver $350,000 in return for two certificates of indebtedness issued pursuant to §344 of the Bankruptcy Act, 11 U.S.C.A. §744 (1970). Each certificate provided in part that:

> This certificate is by said order made a lien upon all property of every kind or nature of Reiner Industries, Inc., the above-named Debtor, now or hereafter coming into the possession of Irving Sulmeyer, the undersigned Receiver (or into the possession of any successor trustee in bankruptcy), or to which the undersigned Receiver (or any successor trustee in bankruptcy)

* Honorable Samuel P. King, Chief United States District Judge for the District of Hawaii, sitting by designation.

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> may acquire title, or the proceeds thereof. Said lien shall be subject to presently existing valid and perfected security interests, trust deeds, liens and other encumbrances, including but not limited to the security interests and encumbrances in the present and future accounts and inventory of the Debtor and Receiver in favor of A.J. Armstrong Co., Inc.; it shall be senior to all expenses of administration in this Chapter XI proceeding and in any superceding bankruptcy proceeding except that said lien shall be junior to charges assessed by the Court for the Referee's Salary and Expense Fund. Notwithstanding the foregoing, the lien of this certificate is subject to depletion for current operating purposes, and the Receiver may pay ahead of the lien of this certificate any costs or expenses incurred by him in connection with his operation of the Debtor's business. . . .

Although the appellant extended the dates of repayment for one month, the additional operating time provided by the loan came to nothing. In late 1973, the Receiver defaulted and the debtor was adjudicated a bankrupt on February 2, 1974.

Sulmeyer, now the trustee in bankruptcy, tried unsuccessfully to sell the business as a going concern in the spring of 1974. On July 2, 1974, after the bankruptcy court rejected an open court bid for certain business assets and a separate bid for stock in a subsidiary of the debtor, Sulmeyer was authorized "to sell said assets at private sale as expeditiously as possible, without further notice to creditors or other parties in interest and without further advertising. . . ." The appellant, through his counsel, was aware of this authorization.

On July 12, Sulmeyer signed an agreement with International Fastener Research Corporation ("IFR") whereby

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IFR agreed to purchase most of the assets of Reiner for $862,000. IFR additionally agreed to loan $138,000 to the Trustee, repayable only if IFR resold the assets at a profit.[1] The agreement provided that it would not be operable unless the court's approval of the agreement became "final for all purposes no later than July 23, 1974." Although the agreement would not be effective until that time, IFR agreed to deposit the $1,000,000 with the trustee on July 12, 1974, so that secured creditors of Reiner Industries could be paid without the estate incurring further interest charges. It was agreed that IFR would be subrogated to these creditor's rights in the event that the sale was not consummated. On July 22, 1974, Kenneth Reiner appealed from the July 12 order approving the sale to IFR. Pursuant to the sale agreement, IFR elected to rescind on July 26, 1974, because the order had not become final by July 23.

No. 75-2483

On July 30, 1974, the trustee obtained an order (the "July 30 order") approving the rescission, authorizing a public auction of the business assets, and confirming IFR's subrogation rights to the first million dollars received from that sale. No appeal was filed and this order became final on August 10, 1974. On September 9, 1974, appellant objected to the subrogation of IFR to the rights of creditors senior to appellant and moved for a reconsideration of the July 30 order. On December 18, 1974, the motion to reconsider the order was denied. Rottenberg appealed both the July 30 order and the denial of reconsideration of that order to the district court. Both appeals were dismissed. In No. 75-2483, Rottenberg asks us to review those dismissals.

1. Under Article II of the sale agreement, IFR agreed to pay the Trustee 50 to 75% of the resale profits, after certain expenses. Record on Appeal at 25. The certificate of indebtedness issued by the Trustee for the $138,000 loan by IFR provided that it would be only payable out of the payments made to the trustee under Article II. Record on Appeal at 37. Thus, the loan was repayable only if IFR resold at a profit.

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No. 75-2482

During July, 1974, while the Trustee still thought that the sale would be consummated, he instituted an action against appellant Rottenberg to determine Rottenberg's priority vis-a-vis other creditors of the bankrupt. On January 2, 1975, the bankruptcy judge ruled that Rottenberg stood behind the costs and expenses of the Receiver and the trustee incurred in the operation of the debtor's and the bankrupt's business. The district court affirmed and Rottenberg appeals from that decision in No. 75-2482.

DISCUSSION AND DISPOSITION

No. 75-2483

Before considering the merits of Rottenberg's objections to the July 30 order, we face the preliminary question of whether or not Rottenberg prosecuted a timely appeal. Both the bankruptcy judge and the district court concluded that Rottenberg's objection was not timely because he failed to file a notice of appeal within ten days of the entry of the July 30 order. We agree.

Bankruptcy Rule 802 requires that all appeals from the orders of referees be filed within ten days of the entry of the order. Rottenberg claims that this rule cannot be applied to him because he had no notice of the entry of the July 30 order. Although there is some dispute as to whether or not Rottenberg's attorney did receive notice, the district court proceeded on the assumption that Rottenberg did not have notice of the order.[2] Nevertheless, the court found that the lack of notice of the entry of the order did not affect the time in

2. Reporter's Transcript of Proceedings, United States District Court, Central District of California, April 9, 1975, at 45, lines 21-22.

which the appeal should have been filed. This decision comports with Bankruptcy Rule 922.

It is the duty of each individual creditor with notice of a bankruptcy proceeding to keep track of those proceedings by constantly checking the record in order to ensure that any order which affects him is properly challenged. *In re St. Cloud Tool & Die Co.*, 553 F.2d 387 (8th Cir. 1976); *In re General Insecticide Co., Inc.*, 403 F.2d 629 (2d Cir. 1968). A referee may file hundreds of orders in one bankruptcy proceeding and it is nearly impossible for him to notify every creditor who could be possibly affected.[3] This ten-day limit for appeals promotes the finality of bankruptcy orders. *In re Abilene Flour Mills Co., Inc.*, 439 F.2d 937 (10th Cir. 1971); *St. Regis Paper Co. v. Jackson*, 369 F.2d 136 (5th Cir. 1966). Without such finality, title to the property of the bankrupt would be clouded and it would be difficult for the trustee to liquidate the estate for the benefit of all creditors.

Rottenberg claims that the ten-day limit, as applied to him, violates his fifth amendment due process rights if his lack of notice of the order is not taken into account. Assuming that appellant had a property right which was affected by the July 30 order, we find this argument unpersuasive. Due process only requires a reasonable procedure to be followed when rights are affected. As noted previously, in a bankruptcy context it is reasonable to require a creditor to keep himself informed of the state of the proceedings. *St. Regis Paper Co. v. Jackson, supra.* Further, appellant waived his right to notice of the July 30 order declaring rescission, subrogating IFR, and authorizing a further

3. The appellant's citation to *In re* Harbor Tank Storage Co., Inc., 385 F.2d 111 (3d Cir. 1967) and *In re* Intaco Puerto Rico, Inc., 494 F.2d 94 (1st Cir. 1974) for the proposition that a creditor does not have such a duty is inapposite. Those cases only allowed a creditor to file a late claim in a Chapter X reorganization when the creditor had never been legally notified of the entire reorganization proceedings.

sale since he failed to object to the waiver of notice for good cause shown and authorization of sale contained in the July 2, 1974 order. After waiving notice of the sale agreement to IFR, he was not entitled to notice of the rescission of the sale agreement and authorization of further sale.[4] Finally, by appellant's own admission, he was aware of the July 30 order by August 30, 1974, more than ten days before the sale authorized by that order took place. Appellant failed to file his complaint until the day before the auction, and the parties involved in the sale were not notified until after the auction took place. In such circumstances, appellant should be estopped from asserting his lack of notice. *Cf. In re Imperial "400" National, Inc.*, 391 F.2d 163, 169 (3d Cir. 1968); *Connelly v. Hancock, Dorr, Ryan, & Shove*, 195 F.2d 864, 868 (2d Cir. 1952). We conclude that the ten-day limit contained in Bankruptcy Rules 802 and 922 as applied does not violate appellant's fifth amendment due process rights.

Rottenberg also appealed from the bankruptcy judge's denial of Rottenberg's motion to grant reconsideration of the July 30 order. The denial of a motion to reconsider a previous order is not an appealable order. *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137-38 (1937); *In re Brendan Reilly Associates, Inc.*, 372 F.2d 235 (2d Cir. 1967). *See* 2A Collier on Bankruptcy, ¶ 39.17 at 1487 (14th ed. 1974). Appellant argues that although the form of the order of December 18, 1974, indicates that the referee simply denied his motion, he actually undertook to re-examine the merits of his July 30 order by taking evidence concerning that order. If the referee had implicitly granted the motion and was in fact reconsidering his July 30 order, the argument might have merit.

4. Appellant's reliance on Allgair v. William F. Fisher & Co., 143 Fed. 962 (3d Cir. 1906), is misplaced. That case dealt with a waiver of further notice of sale if the sale occurred within a certain time period. For a sale beyond the sale period, a new waiver was required.

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 150-51 (1942). However, the referee listened to submissions about the order while reserving his decision as to whether or not he should grant reconsideration.[5] Whenever someone asks for reconsideration, the grounds for that motion are necessarily entwined with the merits of the controversy. A referee must be able to at least examine the grounds for reconsideration without actually "reaching the merits;" otherwise, party could force him to reconsider merely by moving for reconsideration.

The form of the referee's final order determines whether it resulted from a reconsideration of the earlier order, and hence is appealable, or whether it is a nonappealable denial of the motion to reconsider. *Pfister v. Northern Illinois Finance Corp., supra.* Although appellant argues that the judge was somehow tricked into signing the wrong order, the record indicates that the judge knew precisely what he was doing by not reaching the merits. The denial of the motion to reconsider is not an appealable order.

Therefore, in No. 75-2483 the decision of the district court dismissing the appeal from the July 30 order as untimely and dismissing the appeal from the denial of the motion to reconsider as a non-appealable order is affirmed.

No. 75-2482

Rottenberg's appeal from the district court's ruling which affirmed the bankruptcy court's order subordinating Rottenberg's claim to certain operating costs and expenses was timely filed and is properly before this court.

Rottenberg's claim is based on the certificates of

5. Reporter's Transcript of Proceedings before the Hon. Howard V. Calverley, November 8, 1974, pp. 79-82.

indebtedness issued by Sulmeyer pursuant to §344 of the Bankruptcy Act, 11 U.S.C.A. §744 (1970). In *White Chemical Co. v. Moradian*, 417 F.2d 1015 (9th Cir. 1969), this court concluded that §344 authorizes a Chapter XI Receiver to grant special and fixed priorities for certificates of indebtedness. These priorities can be senior to both past and future creditors in the Chapter XI proceedings. *Id.* at 1019-20. In dictum, this court also stated that such priorities are "subject of course to the 'super priority' given costs in the superceding bankruptcy [by section 64(a)(1), 11 U.S.C.A. §104(a)(1) (Supp. 1976)]." *Id.* at 1018. Thus, a certificate of indebtedness can provide a priority for the holder over all other creditors in the Chapter XI proceeding. However, this court has indicated that such a certificate probably cannot provide for a priority over those bankruptcy costs listed in §64(a)(1) of the Act in the superceding bankruptcy proceedings.

Against this background, we turn to the specific language of the certificates as quoted in the first paragraph of this opinion in order to ascertain the nature of the priority which Rottenberg obtained. One notices a number of ambiguities in the certificates. They make Rottenberg's claim senior to the administrative expenses of both the Chapter XI and the superceding bankruptcy proceedings, but then turn around and subject the lien to "depletion" for current operating purposes at least during the Chapter XI proceeding and perhaps also during the subsequent bankruptcy period.

The bankruptcy judge interpreted the certificate to mean "that Mr. Rottenberg's lien is behind the Referee's Salary and Expense Fund and the expenses of the Receiver who later became trustee in operating the business of the debtor."[6] As we read that decision, the certificate was interpreted to mean that

6. Letter of November 14, 1974, by the Hon. Howard V. Calverley at 6, Record on Appeal at 150.

with the exception of the Referee's Salary and Expense Fund Rottenberg's claim was senior to administrative expenses in *both* the Chapter XI proceeding and the bankruptcy proceeding, except that in both proceedings those administrative expenses which were necessary for the operation of the business would be senior to Rottenberg's claim. As noted earlier, those concerned felt that it would be better to continue the operations of the business so that it could be sold as a going concern. In light of the fact that the $350,000 loan from Rottenberg was obviously going to be used to continue to operate the business, and especially considering the fact that appellant never objected to the continued operation of the business, *see American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A.*, 280 F.2d 119, 123-24 (2d Cir. 1960), we cannot say that this interpretation of the intent of the parties was erroneous as a matter of law.

On the record before us, however, we cannot determine whether those expenses[7] claimed by the Trustee to be senior to Rottenberg's lien were justifiable operating expenses or not. We therefore vacate the decision of the district court and remand the case with instructions to determine the nature of each listed claim and arrange payment as follows:

(1) The liens of secured creditors who are senior to Rottenberg.

(2) As suggested by *White Chemical Co. v. Moradian, supra,* at 1018,[8] those costs of the

7. Including those "extra" payments to Armstrong and NACC of which appellant complains. Brief for Appellant in No. 75-2482 at 10-12.

8. Although the intent of the parties may have been to subordinate §64(a)(1) costs to Rottenberg's lien, *White Chemical* suggests that §344 does not authorize the bankruptcy court to approve such a certificate of indebtedness. 417 F.2d at 1018. As this point was not argued by the parties, we do not feel compelled to depart from the *White Chemical* suggestion.

superceding bankruptcy proceeding listed in §64(a)(1) of the Bankruptcy Act, 11 U.S.C.A. §104(a)(1).

Then, to the extent not covered in (2),

(3) The costs of the Referee's Salary and Expense Fund and those operating expenses incurred in the effort to maintain the business as a going concern, including reasonable fees for the Receiver-Trustee and his counsel in compensation for those services which would necessarily have been performed in the ordinary course of the business.

(4) Rottenberg's lien.

(5) Other fees for the services of the Receiver-Trustee and his counsel[9] and other costs of administration.

The decision of the district court in No. 75-2482 is affirmed in part, reversed in part, and remanded with directions.

The parties shall bear their own costs on appeal.

9. These fees come last per page four of the complaint filed by Trustee Sulmeyer on July 16, 1974, Record on Appeal at 62.